No. 92-1490

In The

Supreme Court of the United States

October Term, 1992

JEAN LORELLE BURKE,

Petitioner,

v.

ROBERT E. JACOBY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONER'S REPLY BRIEF

RICHARD M. MEYER*
One Pennsylvania Plaza
49th Floor
New York, N.Y. 10119
(212) 594-5300

Attorney for Petitioner

Of Counsel:
LEE S. SHALOV
MILBERG WEISS BERSHAD SPECTHRIE & LERACH
One Pennsylvania Plaza
New York, N.Y. 10119

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

The principal point of law advanced by respondent is that petitioner cannot prevail unless she can demonstrate that she would have dissented from the merger and sought appraisal if respondent had stated the material facts truthfully. R. Br. 10-14. As set forth in the petition (pp. 8-13), this standard of causation has been rejected by this Court and every circuit court of appeals which has previously passed upon the issue. Respondent's brief offers virtually no refutation of the petition in this respect.

Because the Second Circuit is a major forum for the resolution of issues under the federal securities laws, and because corporate takeovers involved values of over $575 billion in 1988,[1] respondent errs drastically in asserting (R. Br. 8) that, "The Petition does not identify a single special or important reason for granting" the writ, particularly in a case of such egregious self-dealing.

Turning to respondent's assertion that petitioner has inaccurately presented the case, we deal with the charges in the order raised by respondent:

> 1. There is not and cannot be any question that the action is brought as a class action. The complaints (both original and amended) allege it in detail. As petitioner pointed out in her main brief in the Court of Appeals (pp. 6, 32 n.15), a request for class certification was made and held in abeyance by the district court. More importantly, however, is the fact that the damage suffered by plaintiff (as well as the other

---

[1] Wall St. Journal, January 2, 1990, p. C1.

class members) resulted from the defrauding of the entire body of Class A shareholders.

2. and 3. Although the shareholders knew of the stock option plan and the fact that respondent had received some options, none (save respondent and a few of his intimates) knew that he had awarded himself 80,000 options – amounting to approximately 20% of the Company. The district court found that petitioner did not know of the size of the option award (29a), a finding undisturbed by the Court of Appeals (11a). No reference to the size of the award was contained in the Company's Shareholders Information Bulletins (Ct. of Appeals App. 167-191), nor were all of the directors informed (*id.* at 1303; 1395). More importantly, petitioner does not seek review of the holding that the 1982 award is barred by the statute of limitations, and thus no issue of fraudulent concealment is presented. It is undisputed that, in seeking shareholder approval in 1986, respondent omitted to disclose the number of options he owned.

4. The district court stated that "a reasonable Class A shareholder might have considered the number of options owned by Jacoby and the extent of his potential profit on them significant . . . there may be a genuine issue of material fact as to whether the omission plaintiff complains of was material and misleading . . . " (39a). The Court of Appeals stated, "In the present case, there may be, as the district court noted, questions of fact as to whether the alleged omissions were material, or whether the description of the Lazard Freres opinion was a material misrepresentation, in the sense that reasonable stockholders might have considered the accurate

information important to their decisions as to whether or not to vote for the acquisition. And it may be, as to the claims of omissions, that the undisclosed information was material, thereby prima facie establishing reliance." (15a). The upholding of summary judgment in spite of these material issues is the point which petitioner asks this Court to review and reverse.

5. As noted by the Court of Appeals (5a), the termination of the stockholders agreement became effective upon the consummation of the acquisition, subsequent to which the Class A stockholders received payment for their shares. The redemption of respondent's Class B stock, however, took place *prior* to the acquisition (Ct. of Appeals App. 395, 399; *see also* R. Br. 3), and thus violated the agreement. Again, this issue has little, if any, relevance, since petitioner claims that respondent breached his fiduciary duty whether or not he also violated the stockholders agreement. Pet. 14-15.

In short, the lead point in respondent's brief – that purported inaccuracies in the petition require denial of the writ – is a misconceived attempt to distract this Court from consideration of the serious and significant errors of the Court of Appeals.

With respect to the state law claim, respondent contends that the claim is "moot" (R. Br. 16), apparently because petitioner was pleased with the price paid by Saatchi. Respondent would have this Court interpret that sentiment as approval of the entire transaction and all of its elements, a gross distortion of petitioner's position.

Finally, respondent cites but two cases dealing with petitioner's contention that, under New York law, a defendant may not rely on the proscriptive provisions of BCL § 623 when it has failed to give proper notice; and both cases support petitioner's contention. *Carroll v. Seacroft. Ltd.*, 141 A.D.2d 726, 727-28, 529 N.Y.S.2d 829, 830 (2d Dep't 1988); *Rank Organization Ltd. v. Pathe Laboratories, Inc.*, 33 Misc.2d 748, 753-54, 227 N.Y.S.2d 562, 567-68 (Sup.Ct. N.Y. County 1962).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, N.Y.
April 15, 1993

Respectfully submitted,

RICHARD M. MEYER*
One Pennsylvania Plaza
49th Floor
New York, N.Y. 10119
(212) 594-5300

Attorney for Petitioner

Of Counsel:

LEE S. SHALOV
MILBERG WEISS BERSHAD SPECTHRIE
& LERACH
One Pennsylvania Plaza
New York, N.Y. 10119

* Counsel of Record